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No. 89-658

In The

Supreme Court of the United States

October Term, 1989

JOHN L. CHEEK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

In this criminal tax case, willfulness is an element of the crime; conversely, good faith is a defense. Petitioner, a tax protester, convincingly centered his defense on the sincere good faith of his belief that he was not breaking the law.

Alone among the Circuits, in the Seventh Circuit sincere good faith is not enough. Unlike any other Circuit, the Seventh Circuit polices beliefs, so that many of petitioner's beliefs are deemed "objectively unreasonable as a matter of law." The result is that petitioner – despite the sincere good faith on which he based his defense – can be sent to jail for holding unapproved beliefs. The jury was so instructed. Petitioner was convicted.

The questions presented are:

1. Is the Seventh Circuit's unique approach, under which petitioner was convicted and jailed because a panel announced that his sincerely-held beliefs were "unreasonable" and therefore impermissible, consistent with the statutes under which petitioner was convicted?

2. If so, is the Seventh Circuit's approach consistent with the First, Fifth, and Sixth Amendments?

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THE OPINION AND JUDGMENT BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit is reported as *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989). It is included in the Petition for Certiorari as Appendix A.

JURISDICTIONAL STATEMENT

This Court's jurisdiction rests upon Title 28, United States Code, Section 1254. The judgment of the Court of

Appeals was entered on August 21, 1989. The Petition for Certiorari was filed with this Court on October 19, 1989, within 60 days of the date of the judgment (former Supreme Court Rule 20). This Court granted the Petition on February 20, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed . . . .

26 U.S.C. Sec. 7201 provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof shall in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof shall be fined not more than $100,000 . . . or imprisoned not more than 5 years or both, together with the costs of prosecution.

26 U.S.C. Sec. 7203 provides in pertinent part:

> Any person . . . required by this Title or by regulations made under authority thereof to make a return, . . . who willfully fails . . . to make such return, . . . at the time or times required by law or regulations shall in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $25,000 . . . or imprisoned not more than 1 year or both, together with the costs of prosecution.

18 U.S.C. Sec. 287 provides:

> Whoever makes or presents to any person or officer . . . or to any department or agency thereof, any claim upon the United States or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than 5 years and shall be subject to a fine in the amount provided in this Title.

STATEMENT OF THE CASE

The Proceedings Below

Petitioner John L. Cheek (hereinafter "Cheek") has worked as a pilot for American Airlines since 1973. (*Tr.* 82). From 1969 to 1979 he filed federal income tax returns. (*Tr.* 119). In 1980 he did not file a return. (*Tr.* 126). For the calendar years 1981 and 1982, he filed a form 1040 which was not an acceptable tax return to the IRS (*Tr.* 175, 179), and then for 1983 through 1986 he did not file returns (*Tr.* 129). From January, 1980 to January 1981, he filed with his employer W-4 withholding statements which claimed an increasing number of withholding allowances, eventually

claiming as many as 60 allowances. (*Tr.* 340-344). Thereafter, he claimed on his W-4 form that he was exempt from withholding. (*Tr.* 349). Based on directions from the Internal Revenue Service, American Airlines withheld income taxes from Cheek's wages anyway (*Tr.* 170), and for the years 1984, 1985, and 1986, Cheek would have been entitled to a refund had he filed. (*Tr.* 816-818).

As early as 1978, Cheek had begun attending seminars and following the advice of a group of persons who can most charitably be characterized as mountebanks.[1] These persons, some of whom are lawyers, dispensed as gospel such dubious income tax advice as the notion that wages are not income (but instead are an exchange of one's labor for money) (*Jt. App.* 48-49), that a "family trust" can be set up permitting the assignment of one's income and the deduction of personal expenses (*Jt. App.* 46-47, 52; *Tr.* 263-274), that one can "resign" from the Social Security system, that the payment of income tax is voluntary, and that the income tax is unconstitutional (*Jt. App.* 57). These self-styled tax experts call themselves "patriots"; the Government calls them "tax protesters."[2]

Cheek attended this group's seminars, subscribed to their newsletters, bought their manuals, watched their videotapes, and was personally "counseled" by their

[1] For Cheek's testimony outlining this development of his income tax understanding, see *Jt. App.*, pp. 46-59.

[2] The term "tax protester" apparently loosely refers to persons who the government believes do not pay taxes for reasons of political protest. See *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

leaders. (*Jt. App.* 46, 50-53). He joined one of their organizations, called the Mid-American Commodity and Barter Association, to which he "assigned" his income, and which paid his expenses. (*Jt. App.* 50-51; *Tr.* 536-537). Cheek was even provided with an "opinion letter" from an attorney which approved Cheek's actions. (*Jt. App.* 57). Based on such indoctrination, Cheek embraced some of this group's positions.[3] (*Jt. App.* 80-81).

Needless to say, these "tax protesters" pushed Cheek down the path to disaster. His cult-like devotion to their cause resulted in his lawsuits against American Airlines, against the Internal Revenue Service, and in Tax Court being dismissed as frivolous. (*Jt. App.* 58-59). His "family trust" was audited and disallowed. (*Tr.* 263, 274). And in 1987 Cheek was indicted for tax evasion for 1980, 1981, and 1983 (26 U.S.C. Sec. 7201); for filing a false claim for refund of his 1982 withholdings (18 U.S.C. Sec. 287); and for willful failure to file income tax returns for 1980, 1981, 1983, 1984, 1985, and 1986 (26 U.S.C. Sec. 7203). (*Jt. App.* 5-15).

Each of these statutes defines a specific intent crime. The only fact question at trial was whether Cheek's conduct was willful, that is " . . . a voluntary, intentional violation of a known legal duty."[4] Cheek's defense was that, based on the almost cult-like indoctrination he got

[3] A long-time acquaintance testified that Cheek was "obsessed." (*Tr.* 1115)

[4] *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976).

from the "tax protesters," he sincerely believed at the time in the lawfulness of what he was doing. As Cheek testified, "I can look at this now, you know, and see the part that is trash . . . I believed it." (*Jt. App.* 54).

Cheek, appearing *pro se*, was found guilty by a jury on all counts, and was sentenced to a year and a day in jail. Both the trial court and the jury had great difficulty applying the instructions mandated in such cases by the Seventh Circuit (see discussion below). The trial court permitted Cheek to remain free on bail pending appeal, stating, "I do not regard any appeal here as frivolous." (*Tr.* 1798). The Court of Appeals for the Seventh Circuit affirmed Cheek's conviction, but granted Cheek's motion to stay the mandate pending this Court's ruling on his petition for a writ of *certiorari*. (*Appendix F* to Certiorari Petition). On February 20, 1990, this Court granted Cheek's petition.

The Jury Instructions

Throughout the trial, the District Court struggled with both the evidentiary and the jury-instruction implications of the Seventh Circuit's unique interpretation of *Pomponio's* willfulness definition as it is applied to tax cases in that Circuit involving so-called "tax protesters."[5]

[5] This unique "objectively reasonable" doctrine is embodied by *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), and by the instant case, *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989).

In its initial set of instructions[6] to the jury, the Court gave the *Pomponio* definition:

> When used in these instructions the term "willfully" means a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent. In establishing that the defendant acted willfully it is not required that the government show that the defendant had a bad purpose.

(*Jt. App.* 78). The Court initially also gave Instruction No. 32, which embodies one prong of the Seventh Circuit's *Buckner* rule:

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendants' own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith understanding of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

(*Jt. App.* 74-75) (Emphasis added). The Court drafted for Cheek and also read to the jury as part of the initial

[6] The entire set of initial jury instructions is included in the Joint Appendix at 64-84.

instructions this "theory of defense" instruction, which recited Cheek's understanding of his tax obligations, but again imposed the objectively reasonable standard:

> It is the defendant John Cheek's theory that he did not willfully fail to file tax returns for the years 1980, '81, '83, '84, '85, '86, nor did he willfully attempt to evade and defeat the income taxes for the years 1980 through 1983.
>
> Mr. Cheek's theory is that he acted at all time in good faith, that is, that he honestly and reasonably believed he was not required to file tax returns. Mr. Cheek contends that he honestly and reasonably believes he is not a taxpayer. He also contends that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so by filing tax returns.
>
> Mr. Cheek contends that his lawsuits against American Airlines and the Internal Revenue Service, his extensive legal research and his frequent conversations with several attorneys, including a written opinion from an attorney Robert L. Collins, demonstrate that he has an honest and reasonable belief that he is not required to file tax returns.
>
> Among other things, Mr. Cheek contends that his wages from a private employer, American Airlines, does not constitute income under the Internal Revenue Service laws. Mr. Cheek also contends that his membership in MACBA and MCBA and his filings of W-4s with the Internal Revenue Service claiming 30 or 60 withholding allowances, as well as claiming exempt status, were not designed or intended to evade federal income taxes because he has contended since 1980 that he is not required to file tax returns or to pay federal income taxes.

> If you find that Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes or to file tax returns, then you should find Mr. Cheek not guilty of all the charges.

(*Jt. App.* 80-81) (Emphasis added).

The latter two jury instructions told the jury, as the Seventh Circuit requires, that willfulness is negated only if Cheek's beliefs or understanding of the law were not only sincerely held, but also "objectively reasonable."[7]

The jury was troubled. At 4:30 p.m. on the first full day of deliberations, they sent this note to the Court:

> We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.
>
> We have struggled with this point for part of the morning & the entire afternoon with no movement.
>
> Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?
>
> Page 53 is the one we cannot get by as to his belief.

(*Jt. App.* 85).

---

[7] These instructions also expressly stated that Cheek's belief that his wages were not income could negate willfulness if sincerely and honestly held and objectively reasonable. It was after closing arguments and after several juror notes that the court then told the jury the exact opposite. See discussion *infra*, p. 35.

In response to this note, and over Cheek's objection, the Court gave a supplemental jury instruction, as follows:

> You have asked for a clarification of page 32 of the instructions discussing good faith misunderstanding and disagreement. As I instructed you, an objectively reasonable good faith misunderstanding of the law negates willfulness. However, a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection system and policies does not constitute a good faith misunderstanding of the law. This additional instruction should be read and considered with all the other instructions in considering your verdict.
>
> The government has the burden of proving willfulness beyond a reasonable doubt.

(*Jt. App.* 86).

Even after getting this supplemental instruction, the jury was deadlocked. At 7:10 p.m., the jury sent out this note:

> We, the jury, are unable to reach a decision. We are all in agreement that Mr. Cheek did not file tax returns in the years charged. We are all in agreement that Mr. Cheek filed incorrect W-4 forms. We are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision.

(*Jt. App.* 87).

At the Government's suggestion, and again over Cheek's objection, the Court gave the jury a second supplemental instruction (Jt. App. 87-89), which stated, *inter alia*:

> An objectively reasonable belief means a belief held by a reasonable person acting reasonably. An honest but unreasonable belief is not a defense and does not negate willfulness.
>
> * * *
>
> Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense.

Here the jury was told, as required by *Buckner, supra*, that Cheek's belief that wages were not income could never support a willfulness defense, no matter how honestly and sincerely he believed it. This part of the second supplemental instruction directly contradicted the original theory of defense instruction.

Approximately 2-1/2 hours after getting this second supplemental instruction, the jury returned with guilty verdicts on all counts. The jury also sent three notes to the Court. (*Jt. App.* 90-91). The first note was signed by all the jurors:

> Judge Plunkett:
>
> We are herein returning our verdict of guilty as charged on all counts.
>
> Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These

opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law.

The second note, from an individual juror, stated:

Judge Plunkett:

I feel Mr. Cheek is a reasonable person and sincerely believes in his cause. I felt I had to write to express what I sincerely feel. I know the gentleman is guilty of a crime. However, I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law.

The third note, written by juror Diener, prompted a brief colloquy with the court:

THE COURT: Mr. Diener writes:

"A 'Honest and Sincere in His Cause' – He is *Guilty*

"B Not 'Objectively Reasonably' He Is Guilty."

Mr. Diener, I am a little unsure of what this expresses.

JUROR DIENER: What I meant there was that his cause was honest and sincere, which he's guilty since we only had this one way – you know, he's guilty, he's – his honest and sincerity is sincere.

THE COURT: I see.

JUROR DIENER: The other part –

THE COURT: But not objectively reasonable?

JUROR DIENER: (sic) Is guilty.

THE COURT: Okay.

JUROR DIENER: I was trying to bring that out to clarify –

THE COURT: I see what you're saying. All right.

At sentencing, Cheek was given a year and a day in prison, although the District Court stated, "I do not want to sentence you for beliefs that I believe were honestly held, although I believe foolishly held." (March 16, 1988 Tr. 4).

SUMMARY OF THE ARGUMENT

This Court has consistently construed the willfulness element of the criminal tax statutes to require proof of "a voluntary, intentional violation of a known legal duty," *United States v. Pomponio*, 429 U.S. 10, 12 (1976), *rehearing denied*, 429 U.S. 987 (1976). This species of the mistake-of-law defense has particular vitality in the tax context, because "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *United States v. Murdock*, 290 U.S. 389, 396 (1933).

In *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), however, the Seventh Circuit formulated a quite different doctrine which it has applied only to one particular type of criminal tax defendant – the so-called "tax protester." This *Buckner* rule has two prongs. First, in order to negate willfulness, *Buckner* requires a defendant to convince the jury not only that his misunderstanding

or belief as to the tax laws was sincerely held ("bona fide"), but also that it is "objectively reasonable." Second, *Buckner* finds that certain listed misunderstandings or beliefs are objectively unreasonable as a matter of law and thus may never be advanced as a defense, no matter what the particular circumstances which gave rise to the belief. Ominously, the Seventh Circuit advised in *Buckner* and *Cheek* that this list of "forbidden" beliefs "no doubt . . . will increase with time." *United States v. Cheek*, 882 F.2d 1263, 1269 (7th Cir. 1989). More ominously still, these pronouncements are applied retroactively, as in Cheek's case, to alleged tax offenses which predated the Seventh Circuit's promulgation of the "forbidden beliefs" list.

The Seventh Circuit's *Buckner-Cheek* rule is totally inconsistent with this Court's construction of the willfulness element of the criminal tax laws as defined in *Murdock* and *Pomponio, supra*. Seven other Circuits have squarely rejected the *Buckner-Cheek* approach as a matter of statutory construction.

Moreover, if *Buckner-Cheek* were found to be consistent with the criminal tax laws, then that novel rule would cause those statutes to violate the First Amendment's freedom of speech clause, the Fifth Amendment's due process clause, and the Sixth Amendment's jury trial clause. When intent is an element of an offense charged, its existence is a question of fact that cannot be taken from the jury by instructions from the Court. *Morissette v. United States*, 342 U.S. 246 (1952). A conclusive presumption which impinges on this jury function violates the Fifth and Sixth Amendments. *Sandstrom v. Montana*, 442 U.S. 510 (1979). And a rule of law which penalizes some beliefs solely because of the perceived obnoxiousness of

their content violates the First Amendment. *Boos v. Barry*, 485 U.S. 312 (1988).

The Seventh Circuit's unique *Buckner-Cheek* rule fails under all of the above standards. Under *Buckner-Cheek*, a jury can convict a defendant of a specific-intent felony even if the defendant lacked criminal intent, if the jury finds that the defendant's belief is "objectively unreasonable." Under *Buckner-Cheek*, certain listed beliefs are *"persona non grata"* as defenses. The jury is told of the conclusive presumption that such beliefs are, as a matter of law, objectively unreasonable. The jury is not permitted to determine the *Murdock* "bona fides" of the defendant's claimed misunderstanding of law, if his beliefs fall within the Seventh Circuit's "forbidden" list.

Buckner-Cheek cannot be permitted to stand.

ARGUMENT

I

THE SEVENTH CIRCUIT'S BUCKNER-CHEEK RULE CANNOT BE RECONCILED WITH THIS COURT'S LONGSTANDING CONSTRUCTION OF THE RELEVANT STATUTES

A. This Court's Decisions

The income tax collection system in this country is enforced through a wide range of both civil and criminal penalties. Criminal prosecution is but the "capstone" of this system of sanctions which exists to "provide a penalty suitable to every degree of delinquency." *Sansone v. United States*, 380 U.S. 343, 350 (1965). Thus, this Court

has consistently held that criminal tax offenses are specific intent crimes, and that a defendant does not become a criminal by his mere failure to measure up to some prescribed standard of conduct. And because of the complexity of the income tax laws, the mistake of law defense has long been recognized as having particular vitality.

In *United States v. Murdock*, 290 U.S. 389 (1933), the defendant was charged with a willful failure to provide information to the IRS when he asserted his Fifth Amendment privilege against self-incrimination in response to questions put to him by a revenue agent. The trial court took two actions which this Court condemned, which are remarkably similar to what happened in the case at bar. First, the trial court instructed the jury that the court believed that the Government had carried its burden and that the defendant was guilty. Second, the trial court refused a defense instruction which would have told the jury that the defendant's actual good faith belief in the propriety of his Fifth Amendment assertion could constitute a defense.

Murdock, 290 U.S. at 396 held:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

The Court held that the defendant had a right to have the question of the absence or presence of evil motive (willfulness) submitted to the jury. The Court added that the defendant was also entitled to the good faith and actual

belief instruction he had requested, even though his refusal to answer the questions put to him by the revenue agent was intentional and without legal justification. *Id.* 396-397. *Murdock* held that in tax cases "bad faith or evil intent" is a specifically required element of the crime. *Id.* at 398.

In reaching these conclusions, *Murdock* first summarized various "willfully" definitions from other cases and contexts. The Court noted that "willfully" sometimes includes an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, obstinately, perversely, a thing done without ground for believing it is lawful, and conduct marked by careless disregard whether or not one has the right so to act.[8] After reviewing these various definitions, the Court concluded that in criminal tax cases an evil motive or intent is an element of the offense.

In *Sansone v. United States*, 380 U.S. 343 (1965), the defendant had realized a capital gain on the sale of a part of his land. His defense was that he believed that repairs needed to be done on the remaining land which he held which would eliminate the gain, and therefore he had no income. *Sansone* held that the defendant's conduct was willful "if he knew he should have reported more income than he did." *Id.* at 353. Just as in *Murdock*, there is no

[8] In its response to the *certiorari* petition, the Government incorrectly states that these sample willfulness definitions in *Murdock* were held to apply to the criminal tax statutes. *Murdock* did just the opposite.

suggestion in *Sansone* that there is some objective standard of conduct to which a criminal tax defendant must conform.

In *United States v. Bishop*, 412 U.S. 346 (1973), this Court considered a Ninth Circuit decision that a lesser kind of willfulness would suffice for conviction of a tax misdemeanor. The Ninth Circuit had held that Bishop could be convicted upon a showing of "unreasonable, capricious or careless disregard for the truth" in the tax treatment of his walnut ranch operations. This Court disagreed. As in *Murdock* and *Sansone*, in *Bishop* this Court once again rejected any notion that willfulness could be shown by an unreasonable, capricious, or careless disregard for the truth. The Court held that willfulness has the same meaning throughout all of the criminal tax statutes. The Court noted that: "In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law." *Id.* at 360. The Court rejected the Ninth Circuit's formulation of a lesser willfulness threshold, stating: "Degrees of negligence give rise in the tax system to civil penalties." *Id.* at 361. The Court reaffirmed what it said in *Murdock* and *Sansone*:

> The Court, in fact, has recognized that the word willfully in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as bad faith or evil intent . . . . or evil motive and want of justification in view of all the financial circumstances of the taxpayer.

Id. at 360.

Three years later, this Court so held yet again. In *United States v. Pomponio*, 429 U.S. 10 (1976), defendants accused of tax evasion invoked as a defense their belief that payments to them were loans and not dividends, and their belief that certain losses were those of a partnership, rather than their corporation. In a per curiam opinion, this Court again noted that willfulness in the tax context requires more than a careless disregard for the truth. *Id.* at 12. The Court concluded that "evil motive" means the specific intent to violate the law. As to jury instructions, the Court stated that willfulness means "a voluntary, intentional violation of a known legal duty." *Id.* at 12. *Pomponio* expressly noted that "an additional instruction on good faith was unnecessary." *Id.* at 13.

B. The Other Circuits

Thus for more than 40 years, from *Murdock* in 1933 through *Pomponio* in 1976, this Court has consistently held that criminal tax prosecutions require proof of specific intent to violate the law, and that such statutes do not reach conduct which is negligent or unreasonable, or which is the result of a bona fide misunderstanding of the duty to file returns or pay taxes. Under this rule, our tax collection system proceeded without any serious reported difficulty. All of the other Circuits which have considered the question have applied *Pomponio* and its antecedents to tax cases involving evasion and failure to file without apparent difficulty, even as to tax protesters. In *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985), Judge Coffin collected both this Court's and the Circuit law to reject as plain error the District Court's "objectively reasonable"

instruction in tax protester cases, and reversed the defendant's conviction. Judge Coffin noted that in the context of criminal tax laws: "The mistake of law defense has particular vitality, and the key is whether the defendant honestly held a mistaken belief as to what the law requires." *Id.* at 193. Other Circuits concur. *United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983); but see *United States v. Schiff*, 801 F.2d 108, 112 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987) (dictum; an objectively reasonable instruction "would not have been error"); *United States v. Ashfield*, 735 F.2d 101, 105 (3d Cir. 1984), *cert. denied*, 469 U.S. 858 (1984); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir. 1956), *cert. denied*, 351 U.S. 969 (1956) ("ignorance of the law is no defense to crime, except that, where willfulness is an element of the crime, ignorance of a duty imposed by law may negate willfulness in failure to perform the duty"); *Mann v. United States*, 319 F.2d 404, 409-410 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964) (plain error to instruct the jury "to speculate as to what any other person . . . would reasonably have expected to be the consequences of his conduct"); *United States v. Burton*, 737 F.2d 439, 441 (5th Cir. 1984) (a taxpayer's claimed belief that wages are not income need not be objectively reasonable to constitute a defense); *United States v. Flitcraft*, 803 F.2d 184 (5th Cir. 1986), *after remand*, 863 F.2d 342 (5th Cir. 1988) (plain error to give an "objectively reasonable" instruction in a tax protester case); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949); *United States v. Jerde*, 841 F.2d 818, 822 (8th Cir. 1988) ("We agree that a subjective rather than an objective standard is to be applied in evaluating a good faith defense [to tax charges]"); *Cooley v. United States*, 501 F.2d 1249, 1253 (9th Cir. 1974), *cert. denied*, 419

U.S. 1123 (1975) ("If a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he willfully intended to fail to file a tax return"); *Haigler v. United States*, 172 F.2d 986, 989 (10th Cir. 1949) ("We think it irreconcilably inconsistent to say in one breath that guilty knowledge of the consequences of the act done is the essence of the offense and in the next breath say that ignorance of the consequences of those acts is no excuse"); *United States v. Phillips*, 775 F.2d 262, 263 (10th Cir. 1985) ("We find that a subjective standard is appropriately applied in assessing a defendant's claimed belief that the law did not require that he file a return"); *United States v. Payne*, 800 F.2d 227, 229 (10th Cir. 1986) (the jury was told " . . . even if a defendant's claim of good faith misunderstanding is 'unreasonable,' the jury may nonetheless still find that the defendant acted in good faith and did not willfully intend to violate the tax law"); *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984) (it is the province of the jury, not the court, to decide defendants' good faith).

In all ten of the above Federal Circuits, a defendant accused of tax evasion or willful failure to file has – just as, under *Pomponio*, he should – a "good faith" defense. In those Circuits, the defendant does not have the added burden of convincing the jury that his beliefs, although sincerely held, are "objectively reasonable" (whatever that may mean). And in those Circuits, the defendant does not face the obstacle that some of his beliefs may have been determined to be "unreasonable" as a matter of law.

C. The Seventh Circuit's Buckner-Cheek Rule

Then in the 1980's the Seventh Circuit formulated what is now known as the *Buckner-Cheek* doctrine. This doctrine was born of frustration and impatience with the so-called tax protesters. It finds no support under the rulings of this Court, in other Circuits, or under the Constitution of the United States.

The Seventh Circuit has not been reluctant to express its disgust and impatience with tax protesters. The Court expressed its weariness of the tax protesters' "tired arguments" in *Coleman v. Commissioner*, 791 F.2d 68, 68-70 (7th Cir. 1986), and then anathematized tax protesters as "thorns in the side of the federal judiciary" a year later. *McLaughlin v. Commissioner*, 832 F.2d 986 (7th Cir. 1987). *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), represented the culmination of the Seventh Circuit's impatience.

Prior to the 1980's, however, there was no suggestion that the Seventh Circuit treated tax protesters any differently than they were treated in the other Circuits. Consistent with this Court's construction of the criminal tax statutes, the Seventh Circuit applied a "subjectively reasonable" standard for good faith defenses.[9] *United States v. Phillips*, 217 F.2d 435 (7th Cir. 1954)[10]; *United States v.*

[9] "Subjectively reasonable" means reasonable to the defendant; "objectively reasonable" means reasonable to someone else.

[10] In *Phillips*, the Seventh Circuit added at 442: "It is not the province of this court, and neither was it that of the trial court, to appraise the reasonableness or unreasonableness of the evidence relative to the advice of counsel theory."

Matosky, 421 F.2d 410, 413 (7th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970). It was not until *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981), that the Seventh Circuit first suggested that the mistake of law defense in tax cases must meet a negligence threshold, that is, must be "objectively reasonable." As other Circuits have since recognized, this statement in *Moore* was pure *dictum*. See *United States v. Burton*, 737 F.2d 439, 443 (5th Cir. 1984).

Notwithstanding this *dictum* in *Moore*, no "objectively reasonable" instruction was given in the next several tax protester cases before the Seventh Circuit. *United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982); *United States v. Koliboski*, 732 F.2d 1328 (7th Cir. 1984). In fact, *United States v. Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984), repudiated the *dictum* in *Moore* and held, consistent with the other Circuits, that in a failure-to-file tax case a defendant's beliefs, even if unreasonable, can constitute a defense! Said the Seventh Circuit: "We agree that Dack was entitled to an acquittal if he could demonstrate a bona fide belief in the necessity of a tax assessment, even if that belief was objectively unreasonable."

Despite *Dack*, in four cases during 1985 and 1986, District Courts in the Seventh Circuit gave an "objectively reasonable" instruction as the law of the Seventh Circuit.[11] *United States v. Thibodeaux*. 758 F.2d 199 (7th Cir. 1985); *United States v. Witvoet*, 767 F.2d 338, 340 (7th Cir. 1985); *United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1986), *cert. denied*, 474 U.S. 1082 (1986); and *United States*

[11] At least one District Judge in the Seventh Circuit continued to advocate the subjective standard. See *United States v. Wojtas*, 611 F.Supp. 118 (N.D. Ill. 1985).

v. Thomas, 788 F.2d 1250, 1253 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986). In all four cases, the Government's proffered "objectively reasonable" instruction was given, and the Seventh Circuit held that proper objection had not been made and that the instruction was not plain error. In the next three reported tax protester cases, the "objectively reasonable" instruction was apparently given, but was not squarely dealt with on appeal. *United States v. Foster*, 789 F.2d 457, 461 (7th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *United States v. Ferguson*, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1986); and *United States v. Sato*, 814 F.2d 449, 451 (7th Cir. 1987), *cert. denied*, 484 U.S. 928 (1987).

It was not until 1987 in response to the "tired arguments" offered by tax protester "thorns in the side of the federal judiciary" that the Seventh Circuit expressly embraced the "objectively reasonably" standard. *United States v. Dube*, 820 F.2d 886 (7th Cir. 1987); *United States v. Davenport*, 824 F.2d 1511, 1517 (7th Cir. 1987). Notably, the Seventh Circuit applied its new "objectively reasonable" standard, contrary to the rule in the other Circuits, contrary to this Court's decisions, and contrary to the Seventh Circuit's own earlier rulings, only to tax protesters, and not to more traditional criminal tax defendants. The crowning blow came in *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), in which the Seventh Circuit, in a two-page opinion, approved the Government's "preemptive strike," in which a number of potential willfulness defenses were precluded before trial as objectively unreasonable as a matter of law.

In *Buckner*, the District Court granted the prosecutor's request for an order forbidding the defense to bring

to the attention of the jury by argument or evidence any matters relating to five enumerated issues. These issues, which the Court characterized as the "repertory of the tax protest movement," are the following:

1. That the Sixteenth Amendment to the Constitution was improperly ratified and therefore never came into being;
2. That wages are not income, and therefore are not subject to federal income tax laws;
3. That tax laws are unconstitutional;
4. That filing a tax return violates the privilege against self-incrimination under the Fifth Amendment to the Constitution; and
5. That Federal Reserve Notes do not constitute cash or income.

The Seventh Circuit held that the possession of and advocacy of these beliefs in a tax protester prosecution "amounts to obdurate refusal to acknowledge the law." Terming the defendant's reliance on *Pomponio, supra*, a mere "technical argument," and ignoring its own 1984 holding in *Dack*, the Seventh Circuit decided that to accept "every mistake of law as a defense" would lead "people to be ignorant, to delude themselves, or to tell tall tales to the jury," and that "[t]o accept only a reasonable mistake as a defense would lead people to learn and comply with the law." *Buckner, supra*, 830 F.2d at 103. The Seventh Circuit clearly has little faith in the ability of juries to distinguish, in tax protester prosecutions, the charlatans from the sincerely misled.

Thus, *Buckner* does two things. First, in the Seventh Circuit a misunderstanding of the law – no matter how honest and sincere it may be – is a defense only if it is

also "objectively reasonable." Second, in the Seventh Circuit certain beliefs are "objectively unreasonable" as a matter of law, thus precluding them from ever being advanced by a given tax defendant, no matter what his particular circumstance or gullibility. And the list of prohibited beliefs is growing. In the instant case, for example, the Seventh Circuit put seven forbidden beliefs on the list as "stock arguments of the tax protester movement." *Buckner, supra*, 830 F.2d at 103. (*Buckner* had been content with only five forbidden beliefs.[12])

Cheek also added the following ominous note: "We have no doubt that this list will increase with time." *Cheek, supra*, 882 F.2d at 1269. Thus, a person in the Seventh Circuit who has some question or confusion about his income tax obligations operates at his peril; the court may one day retroactively decide that his particular misunderstanding was, in the opinion of the judges, "objectively unreasonable" and thus forbidden. Indeed, *Buckner* was applied to Cheek's prosecution even though the offenses that Cheek was charged with occurred prior to *Buckner*, and arguably at a time when *Dack* was the law in the Seventh Circuit.

Surely this Court cannot countenance such lawlessness. Tax protesters may well be "thorns" in our side. But

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[12] *Cheek* added to the *Buckner* list the belief that the Sixteenth Amendment is unconstitutional generally and the belief that the income tax violates the "takings" clause of the Fifth Amendment. *Cheek* also acknowledged that the Seventh Circuit rule is contrary to every one of the seven other Circuits which have considered the question: the First, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits.

we as a society have a commitment to trust in the collective wisdom, perception, and ability of a jury to distinguish the guilty from the innocent. We are not (or were not, before *Buckner* and *Cheek*) in the business of convicting and jailing honest and sincere persons whose legal sophistication fails to reach some judicially-created standard.

Thus, *Buckner* and *Cheek* established law, unique to the Seventh Circuit, which:

1. is applied only to tax protesters;
2. permits conviction, even if a belief is sincerely held;
3. precludes certain beliefs from being advanced regardless of the circumstance;
4. is applied retroactively; and
5. may in the future condemn other beliefs not now known to be condemned.

II

THE SEVENTH CIRCUIT'S UNIQUE BUCKNER-CHEEK RULE IS AS UNNECESSARY AS IT IS UNFAIR

Buckner-Cheek does to the criminal tax laws precisely what this Court's decisions, and this Court's construction of the criminal tax statutes, forbid. *Buckner-Cheek* espouses the very judicially-created "prescribed standard of conduct" condemned by this Court in *Murdock*. It lowers the standard for willfulness to that which was condemned by this Court in *Bishop*: a "showing of unreasonable, capricious or careless disregard for the truth." Under *Buckner-Cheek*, a criminal tax defendant may not

harbor beliefs which federal Circuit Judges deem unreasonable. And a tax defendant who dares to harbor beliefs on the Seventh Circuit's proscribed list is conclusively presumed to have exhibited an "unreasonable, capricious, or careless disregard for the truth." *Buckner-Cheek* turns specific intent crimes into negligence crimes.

Under the pretext of encouraging people "to learn and comply with the law," *Buckner-Cheek* does all this solely out of impatience with the "tax protester movement." But for a court to deal so harshly and summarily with the "tax protester movement" is dangerous indeed; as in this case, the innocently gullible are caught in the same *Buckner* net as the cynically willful violators. And *Buckner-Cheek* shows no respect for the considerable ability of a jury to make the essential "willfulness" judgment. This Court must be especially vigilant to ensure that people who espouse annoying and controversial beliefs, as defenses to a criminal charge, are treated no differently than those whose beliefs are more traditional. In the Seventh Circuit, a defendant indoctrinated to believe that wages are not income may not offer such a subjective state of mind as a defense; on the other hand, a defendant who wrongly believes that a particular payment to him is a loan rather than income may tender that as a defense. What is the difference between those two equally wrong beliefs? Only that one has passed a judicial "litmus test" and the other has not. One belief, though wrong, is "respectable"; the other smacks of the annoying tax protester. Such an approach is both dangerous and fatally inconsistent with this Court's construction of the criminal tax statutes.

Under *Pomponio* and its progeny, the following principles apply to criminal tax prosecutions:

> (1) A defendant who knows what the law is and who disagrees with it (or disobeys it to make a political statement) does not have a bona fide misunderstanding defense[13]; but
>
> (2) A defendant who fails to file a return or to pay taxes because of a bona fide misunderstanding of his duties to file and pay taxes has not acted willfully.

Whether such a claimed misunderstanding is bona fide or pretextual is a classic example of the sort of fact question, unique to each case, which is for juries to decide. Common sense and experience tell us that whether a claimed misunderstanding is bona fide or pretextual in a particular case is dependent on at least three factors: (i) the content of the claimed misunderstanding; (ii) the source, origin, or basis of the misunderstanding; and (iii) the background or sophistication of the defendant in tax matters. *Buckner-Cheek*, however, eliminates this individualized, fact-based jury determination, and replaces it with a judge-made conclusive determination related solely to the content of the claimed misunderstanding. That is both unfair and unnecessary. In assessing "willfulness" in a tax protester prosecution, a jury is certainly free to consider as one factor the reasonableness of a defendant's

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[13] In its response to our *certiorari* petition, the Government dances on the head of a pin by claiming that a defendant "knows his legal duty" even though he does not "subjectively believe it." We leave such a discussion to the philosophers. Under *Murdock* and *Pomponio*, a defendant who has a bona fide misunderstanding of his duty to file does not "know" his legal duty, and lacks willfulness.

claimed misunderstanding. But what is relevant is not only the reasonableness of the content of the defendant's claimed misunderstanding, but more importantly, the reasonableness of its genesis – that is, how the defendant came to think that (*e.g.*) wages were not income. Cheek, for example, was told this at hotel seminars, by lawyers, and by speakers whom even the Government's witness said were "very convincing." Cheek was furnished tracts, tape cassettes, form letters, and complaints by these persons. Can it fairly be said that Cheek's reliance on these sources, or their persuasiveness, is always, as a matter of law, irrelevant to his willfulness?

Buckner-Cheek, however, says that the genesis of a defendant's forbidden belief is irrelevant, because the content of the belief is forbidden (is "objectively unreasonable as a matter of law"), and the jury may hear no more. Thus, by focusing solely on the content of a belief, *Buckner-Cheek* deprives any particular defendant of his day in court to explain to the jury how he came to believe such an objectively unreasonable thing. Similarly, *Buckner-Cheek* prohibits the jury from considering the tax sophistication or tax gullibility of the particular defendant before them. Indeed, Cheek's jury was expressly told that the "advice or research" that resulted in the forbidden conclusion "is not objectively reasonable." (*Jt. App.* 88). Thus, *Buckner* imposed a negligence standard not only on the content of Cheek's own understanding, but also on the advice and research others gave him – and then, in effect, directed a verdict on both points.

An examination of the record in this case demonstrates the unfairness of *Buckner-Cheek*. The Government

argued that Cheek knew very well what his tax obligations were, but that he disagreed with the tax laws. Out of a sense of political protest, according to the Government's theory, Cheek embarked on the suicidal path of refusing to file his returns (even when he was due a refund), bombarding the IRS with letters, and even suing his longtime employer, American Airlines, to stop all withholding of taxes. Despite all the warnings to Cheek about his duty to file, the Government argued, Cheek "obdurately refused" to acknowledge the law. (*Tr.* 1662-1667). (The Government also argued, of course, that in any event Cheek's views were not objectively reasonable. (*Tr.* 1620).)

To be sure, Cheek's asserted beliefs may appear bizarre to this Court. "But juries are not bound by what seems inescapable logic to judges." *Morissette, supra*, 342 U.S. at 276. Cheek's defense – that, in fact, he honestly believed them at the time – was hardly frivolous. His testimony outlines the development of his views as he was swept ever further into the tax protest movement through well-appointed seminars, "very convincing" speakers, tracts, tapes, and attorney opinion letters. (*Jt. App.* 46, 50-53, 57). Under *Buckner-Cheek* none of this was relevant (as the jury was ultimately told). But even the law books are rife with tales of well-meaning, naive people who buy desert real estate, invest in companies that claim to be able to turn water into gasoline, and otherwise fall for a line which is "too good to be true." In the case at bar, when these self-styled "tax patriots" rented their hotel conference rooms, presented lawyers as speakers, misquoted this Court's cases, and counseled their

paying customers that wages are not income, they resembled such snake-oil salesmen of lore. John Cheek bought their desert real estate and their wellness potions. It is certainly not beyond the law's experience that he actually and sincerely believed the party line that those "tax patriots" were peddling. (In any other Circuit, he would have been permitted to have the jury decide that question.)

Indeed, called as a prosecution witness against Cheek was one Anthony Pacelli, a chiropractor from Chicago. (*Tr.* 532-553). Mr. Pacelli testified, as a government witness, that he had listened to the same speakers, joined the same barter association, and set up the same trust as had Cheek. Mr. Pacelli testified that he too stopped paying taxes as a result of what he was told by the tax protesters. Mr. Pacelli stated that the information he was given was "very convincing" to him for several years (*Tr.* 547), and that he believed at the time that he was not violating the law.

Mr. Pacelli, however, settled his problem civilly with the IRS and was not prosecuted (*Tr.* 543). The factual line between the conduct and beliefs of Government witness Mr. Pacelli and the conduct and beliefs of criminal defendant John Cheek is fine indeed, if it exists at all. (Apparently the Government's distinction is that Cheek persisted in his conduct and beliefs longer than did Mr. Pacelli.) No doubt the Government has discretion to make such subtle distinctions when deciding whom to prosecute and whom to attack civilly. But the very subtlety of the line between criminal intent and innocent gullibility in cases such as this eloquently argues that in this area courts should hesitate long before intruding upon the jury's constitutional fact-finding function with a judicial

"pre-emptive strike" such as *Buckner*. That hesitation is doubly counseled because the opinions and conduct of "tax protesters" are ofttimes annoying to both the Government and the judiciary. But we have not, until *Buckner*, marched people off to jail because their view of the world is annoying to us.

No doubt some tax protesters know very well what their tax obligations are, and intentionally refuse to comply. If the Government can convince a jury of that beyond a reasonable doubt, then it may have its conviction. If it cannot carry that burden, the Government still possesses myriad civil and administrative remedies by which not only taxes, but substantial penalties as well, may be collected. There is neither need nor justification for giving the Government the exceptional helping-hand in tax protester cases which *Buckner* represents.

The *Buckner-Cheek* "objectively reasonable" rule is also fraught with practical problems, as the case at bar demonstrated. The District Court was faced with the dilemma of truncating Cheek's evidence of his misunderstanding of his duty to file returns. (*Tr.* 508, 849). This dilemma existed because some of Cheek's beliefs were forbidden under Buckner, and some were not. When both forbidden and other beliefs were commingled in a single document, the court had to redact it. (Sometimes that was not possible. For example, the court admitted a great deal of evidence on the genesis of Cheek's understanding that wages are not income, but an even exchange of labor for money – a belief forbidden by Buckner – because it was impossible to comprehensibly redact Cheek's own testimony about the sequence of events which led to his

misunderstanding. Thus the jury heard considerable evidence which it was later told was irrelevant – surely a sorry state of affairs.)

Another aspect of *Buckner* confused even the Government in this case. The Government (unsuccessfully) took the position at trial that documents, speeches and other such evidence about Cheek's beliefs were relevant to Cheek's state of mind only if Cheek testified that he relied on them. (*Tr.* 425). Under the "objectively reasonable" standard, however, evidence of a given belief's reasonableness would be relevant, even if the particular defendant was not aware of that evidence. This raises the specter under *Buckner-Cheek* of a coterie of tax protester "experts," or lawyers testifying that in their opinion the defendant's views are objectively reasonable. Such testimony would be relevant even if the defendant never relied on the witnesses. Surely the Government cannot intend this result to be the law of the land. But it follows directly from the "objectively reasonable" rule; and, if the Government prevails in this case, tax protester trials may be longer, more complex, and more difficult for district judges to manage.

The better rule, and the rule mandated by *Pomponio* and followed everywhere outside the Seventh Circuit, is to focus the evidence on the willfulness or lack thereof of the defendant – not on a litmus test of his beliefs. Like any other defendant, a tax defendant must produce some evidence to support a "good faith" misunderstanding defense. That traditional evidentiary requirement is sufficient protection against wholly frivolous claims.

The required *Buckner* jury instruction also confounded the District Court and the parties. The initial set of instructions told the jury that an objectively reasonable good faith misunderstanding of the law negates willfulness (*Jt. App.* 74), but the phrase "objectively reasonable" was not defined. The initial instructions also told the jury that Cheek's defense was that he honestly and reasonably believed that he was not a taxpayer (as the statute defines it), that he had been attempting to test the constitutionality of the tax laws, and that his wages did not constitute income. (*Jt. App.* 80-81). After the jury indicated it was deadlocked, the Court tried to explain *Buckner* further by giving a supplemental instruction which flatly contradicted the initial instruction. Having earlier been told that "wages are not income" was part of Cheek's defense, the jury was now told that that belief could not serve as a defense. (*Jt. App.* 88).

The Court in its supplemental instruction also tried to define "objectively reasonable":

> An objectively reasonable belief means a belief held by a reasonable person acting reasonably. An honest but unreasonable belief is not a defense and does not negate willfulness.

(*Jt. App.* 88). This "reasonable man" definition should appropriately be left to the negligence/tort cases whence it came. It has no place in a criminal tax trial.

That implementing *Buckner* through jury instructions should confound the learned and experienced trial judge is a powerful statement of *Buckner's* inappropriateness. And the confusion was not limited to the trial judge. The jury too was confused by the instructions throughout its

deliberations. All twelve jurors undertook the extraordinary step of submitting with their verdict their written criticism of what they saw to be a "narrow and hard expression" of the law. (*Jt. App.* 90).

Like the District Court and the jury in this case, moreover, even the Department of Justice had (until this case) shown an aversion to *Buckner*. In recommending jury instructions in tax cases to United States Attorneys' Offices throughout the nation, the Department nowhere urges prosecutors to include an "objectively reasonable" requirement. See CRIMINAL TAX MANUAL, U.S. Dept. of Justice - Tax Division, Criminal Section, U.S. Gov't Printing Office, 1986 Ed. (Proposed Instruction No. 87 for violation of Title 26, U.S.C. Sec. 7203).

The Seventh Circuit may see *Buckner* as a cure for the annoyance of tax protesters. The cure, however, is worse than the perceived ailment. The *Buckner* rule is difficult to apply, unfair, unnecessary, irreconcilably at odds with previous statutory construction, and dangerously close to censorship. *Pomponio* has been the law for many years. The *Pomponio* rule has worked quite well in ten other Circuits when applied to tax protesters. The Government does not need *Buckner*. This Court should reaffirm our system's commitment to trust juries to distinguish the charlatans from the confused.

III

THE BUCKNER-CHEEK RULE VIOLATES THE CONSTITUTION

Buckner presented the District Court with still another major problem. The offenses with which Cheek was

charged were alleged to have been committed between April 1981 and April 1987 (*Jt. App.* 5-15). Cheek's superceding indictment was returned on September 14, 1987 (*Jt. App.* 5). *Buckner* was decided on October 1, 1987, after the dates of the alleged offenses and after the indictment. Yet *Buckner's* "pre-emptive strike" was applied to the trial of Cheek's alleged *pre-Buckner* offenses to eliminate defenses which he would have had *pre-Buckner*. More galling than that, at the time of Cheek's offenses, arguably *United States v. Dack* was the law of the Seventh Circuit, which imposed only a "subjectively reasonable" standard on Cheek's state of mind. Thus, conduct which was not criminal when performed in 1981 through 1987 became criminal after October 1, 1987 (that is, for example, the failure to file returns based on a sincerely-held belief or misunderstanding that wages are not income). This retroactivity offends fundamental notions of fairness.[14] *Marks v. United States*, 430 U.S. 188 (1977). It is also a key and unambiguous element of *Buckner-Cheek*.

What has already been said about *Buckner-Cheek* demonstrates that its construction of the criminal tax statutes also runs foul of the Fifth and Sixth Amendment constitutional standards established by this Court in *Morissette v. United States*, 342 U.S. 246 (1952), and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Let us revisit *Morissette* briefly.

Mr. Morissette went hunting on Government land. He took for his own use metal bomb casings which he

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[14] Cheek continually raised this objection at trial to no avail. (*Tr.* 855, 1259, 1477).

found lying about, believing them to be abandoned. He was convicted of theft of Government property; because he was on Government property at the time, the trial court refused to submit his abandonment defense to the jury. This Court reversed on constitutional grounds. The Court first observed that a "universal and persistent" notion of our system of law is that "injury can amount to a crime only when inflicted by intention." Thus, conviction for theft of Government property required proof of some *mens rea*. The Court then held that the question of *mens rea* or intent was one for the jury to decide, not the trial judge. Thus, when the trial judge decided that Morissette's abandonment defense was unconvincing ("objectively unreasonable") and for that reason refused to submit it to the jury, constitutional error resulted. As this Court held, "A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." 342 U.S. at 275. And, speaking almost prophetically to the Seventh Circuit's *Buckner-Cheek* rule 35 years later, this Court noted: "Such incriminating presumptions are not to be improvised by the judiciary . . . . [J]uries are not bound by what seems inescapable logic to judges . . . . Whether that intent existed, the jury must determine." *Id.* at 275-276.

The criminal tax statutes are, under everyone's theory, specific intent crimes. Thus, *Morissette's* standards must be met if *Buckner-Cheek* is to survive. Even a casual analysis reveals that both prongs of *Buckner-Cheek* – first, that a defendant's bona fide misunderstanding of the law must also be objectively reasonable to constitute a defense, and second, that certain listed misunderstandings

(and some misunderstandings to be identified in the future) can never be defenses – fail this Court's test.

The first prong violates the fundamental rule, articulated in *Morissette*, that a specific intent crime requires for conviction proof that it was "inflicted by intention." *Buckner-Cheek*, by contrast, expressly contemplates a tax conviction when a defendant's misunderstanding is held honestly, sincerely, and in good faith, if the misunderstanding is objectively unreasonable. Thus, the defendant may entirely lack criminal intent or *mens rea*, and yet be convicted because of the failure of his conduct "to measure up to the prescribed standard of conduct." *Murdock, supra* at 396. *Murdock* condemned such a result as a matter of statutory construction; *Morissette* condemns it under our Constitution.[15] John Cheek may not be jailed merely for being stupid, gullible, or unreasonable. He may not be jailed for embracing forbidden beliefs. He may be convicted and jailed only if a jury finds that he acted with criminal intent – a finding which, given the jury's notes in this case, it quite clearly did not make.[16]

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[15] The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. *Morissette, supra* at 263. See also *Lambert v. California*, 355 U.S. 225 (1957).

[16] In *Liparota v. United States*, 471 U.S. 419 (1985), this Court recently reminded the Seventh Circuit that non-*mens rea* offenses are disfavored. This Court reversed a food stamp statute conviction, holding that intent must be inferred as an element.

The second prong of *Buckner-Cheek* (the pre-emptive strike, placing certain beliefs on the "forbidden list" as a matter of law) violates the equally fundamental notion, articulated in *Morissette*, that a defendant has a constitutional right to have a jury decide his guilt or innocence. *Buckner-Cheek* engages in the judicial improvisation condemned by this Court, by barring as a matter of law certain defenses because these defenses fail the Seventh Circuit's litmus test of "objective reasonableness." Implicit in this aspect of *Buckner-Cheek* is an unwillingness to trust juries to decide tax protester cases. But it is not for a court to decide whether a defendant acted in good faith, no matter how obvious the answer appears to the court. As this Court observed in *United States v. Martin Linen Supply Company*, 430 U.S. 564, 572-73 (1977):

> [The jury's] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing a jury to come forward with such a verdict, . . . regardless of how overwhelmingly the evidence may point in that direction.

In all contexts save tax protesters, the Seventh Circuit adheres to this fundamental respect for the jury system. As early as 1908, the Seventh Circuit, in *Konda v. United States*, 166 F. 91, 93 (7th Cir. 1908), made this observation:

> Our conclusion is that an accused person has the same right to have twelve laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful

> and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied upon in the plain and simple one.

Thus, it is immaterial that the Court of Appeals and the Government assert that no sane human being could honestly believe that wages are not income. It is not their prerogative to make that final judgment. It is the jury's prerogative – or was until *Buckner-Cheek* took it away.

Buckner-Cheek conclusively presumes that the possession of certain beliefs or understandings about the tax laws can never be reasonable or even sincere – regardless of the circumstances of a particular defendant. This Court's respect for our jury system has made this Court wary of conclusive presumptions generally in criminal cases, especially when the presumption deals with criminal intent. See *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985). *Buckner-Cheek's* conclusive presumption deals with defenses to willfulness, but it nevertheless lessens the Government's burden and infringes on the jury's function just as much as the conclusive presumptions condemned in *Sandstrom* and *Francis*.

It is not necessary to elaborate further on these fatal constitutional flaws in *Buckner-Cheek*. That novel rule has no place in a society dedicated to trusting the collective wisdom of a jury to decide guilt or innocence in a criminal case. Because *Buckner-Cheek* is an arrow aimed narrowly and solely at one particularly unloved group of defendants – tax protesters – another constitutional danger must be mentioned, however. *Buckner-Cheek* abandons

all neutrality toward the beliefs of tax protesters (the "repertory of the tax protest movement," according to *Buckner* at 103) by roundly condemning those beliefs, and by announcing that they are impermissible even if honestly held. This is a dangerous thicket for any branch of Government to enter. See generally *Boos v. Barry*, 485 U.S. 312 (1988), and *United States v. O'Brien*, 391 U.S. 367 (1968). As noted earlier, in the Seventh Circuit, a defendant who sincerely believes bribes are not income (and thus misunderstands his duty to report them) has a defense; but a defendant who sincerely believes wages are not income has no defense. What is the difference? Only the Seventh Circuit's conclusion that one belief is respectable and the other is annoying. Where is the right, under this Court's First Amendment cases, for the Government to make such content-related distinctions?

The impact on prosecution decisions is chilling. The Government has virtually unbridled discretion in deciding whom to prosecute from among the universe of income tax non-filers. In the Seventh Circuit, this discretion may now be directed at those "annoying" non-filers who have professed the "forbidden beliefs," because these persons will have no defense. (In the other Circuits, the Government's discretion must be directed at what surely is the only proper criterion for prosecution; that is, which non-filers have acted willfully. *Wayte v. United States*, 470 U.S. 598 (1985).) Thus, *Buckner-Cheek* stands as a "thorn in the side" of the First Amendment, with the capacity to fester into an open wound. This potential First Amendment problem is yet another indicium of the unsoundness of *Buckner-Cheek*.

The *Buckner-Cheek* rule thus violates this Court's constitutional standards under the Fifth and Sixth Amendments. That rule is also inconsistent with the values underlying the First Amendment, because it is not content-neutral (it is, in fact, deliberately not content-neutral) in its application.

CONCLUSION

Solely to deal with the "annoying thorns" of tax protesters, the Seventh Circuit has turned its back on its own precedents, on this Court's longstanding statutory construction, on the decisions in the other Circuits, and on the Constitution itself.

Buckner-Cheek is difficult to apply, unfair, unnecessary, and dangerous.

Our criminal justice system is strong enough and fair enough to deal with tax protesters (and any other annoying defendants) without being untrue to our nation's heritage. This Court should remind the Seventh Circuit of that fact.

For the reasons stated, Petitioner John L. Cheek respectfully requests that this Court REVERSE the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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